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November 8, 2010

Subject: Comments on West Virginia's Phase I WIP

Dear Jennifer,

Potomac Riverkeeper Inc (PRK) represents over 2500 members in the Potomac River watershed that support our efforts in protecting water quality in the Potomac 's rivers and streams through enforcement and community action. It is our responsibility to speak for the Potomac River and voice concerns that threaten clean water. PRK acknowledges the attempt of the West Virginia Watershed Implementation Team to develop a plan of action to address the nutrient loading reductions required by the EPA and the Chesapeake Bay Model. However, PRK strongly disagrees with the approach that West Virginia has taken. Specifically, the continued use of voluntary practices within the agricultural community, focusing on targeting Jefferson and Berkeley County agricultural community, requesting to exchange excess phosphorus for a reduction in nitrogen load, the use of nutrient trading as a key component for future offsets.

The agricultural voluntary practices may have had some progress in West Virginia, but many of the rivers and streams in the Potomac Watershed continue to suffer from excessive nutrients creating algae blooms that have significant ecological threats. USGS has found sections in the South Branch Potomac containing intersex fish along with the Shenandoah, the Potomac main stem and now intersex fish have been found in the Susquehanna<sup>1</sup>. Many of these areas are rural landscapes with agriculture as the dominant land use. It is imperative that West Virginia not just concentrate on Jefferson and Berkeley County to satisfy the Bay TMDL nutrient reductions, but all counties in the Potomac Watershed. Focusing on the two Eastern Panhandle counties is unfair to the citizens and tourists that spend thousands of dollars to recreate on rivers like the South Branch Potomac, the Cacapon River, and Patterson Creek. These people and the aquatic species that thrive in the rivers require clean, pollution free water.

23

<sup>&</sup>lt;sup>1</sup> Intersex in Smallmouth Bass Coincident with Population and Agriculture in Potomac Watershed. http://www.usgs.gov/newsroom/article.asp?ID=1870

West Virginia's draft WIP is deficient in that it failed to commit to specific actions to achieve pollutant allocations under the Bay TMDL, relies on mostly voluntary programs to reduce pollutant discharges from its nonpoint sources, and does not provide any information to assess the effectiveness of and compliance with these programs. The draft WIP would lower phosphorus discharges to a level that is 6 percent below the target allocation. However, the draft WIP still permits nitrogen and sediment allocations to be 18 percent and 38 percent, respectively, more than the level allowed by the target allocation.

West Virginia must commit to taking specific actions that will ensure achievement of the Bay TMDL and provide more compliance and participation information to ensure that nonpoint sources contribute to the nitrogen, phosphorous, and sediment reductions. Additionally, each State has different processes for estimating waterbody impairment and therefore different TMDL development strategies. West Virginia has Biological Impairment TMDLs that looks at nutrients as a function of the impairment, but does not have caps for nitrogen or phosphorous and relies on the reduction of fecal coliform from point sources to reduce nutrients. West Virginia's process for evaluation impairment is the worst of all the States, and consequently, West Virginia is severely lagging behind others in the Potomac watershed. West Virginia needs to develop nutrient TMDLs that set caps for nitrogen and phosphorus for both point source and non-point sources.

#### **Enforcement of NPDES Permits**

The draft WIP does not contain much enforcement information, apart from noting that there are "regular" inspections of wastewater facilities and that the state is in the process of developing an enforcement protocol for stormwater discharges. For example, in Berkeley County, two waste water facilities have violated their NPDES permit for close to two years. Both facilities are operated by Berkeley County Public Service Sewer District and have received 16 to 18 "Notice of Violation" reports during State enforcement inspections. No action has been taken by West Virginia, and these two facilities continue to pollute the Opequon Creek.

It is also important to have complete accounting of all nutrient loads. The less significant WWTPs (40,000 gpd or less) need to have their flows measured and nutrient loads calculated in the final WIP.<sup>2</sup>

## Monitoring and Verifying Voluntary Practices by Nonpoint Sources

West Virginias' approach to reducing nutrients from agriculture continues to use voluntary programs. Some progress has been made by using voluntary practices; however, the streams and rivers in the West Virginia Potomac Basin continue to be plagued by excessive nutrients and consistent algae blooms, year after year. Voluntary practices are not working. There needs to be a serious attempt in the WIP to control nutrients from farms through regulation. At the very minimum, Nutrient Management Plans need to be required for all farms and be publicly available. Dairy and Beef operations should be required to fence the animals out

- 2 -

<sup>&</sup>lt;sup>2</sup> The concentration of nutrients for smaller and primarily older systems are given an estimated value of 18N and 3P. These concentrations are assumed and can vary depending on the time of year and the source of additional waste, i.e. septic tank service trucks.

of the streams and a 40% target should be a two year milestone, not an overall target to be completed by 2025.

### **Sediment Loading**

Sediment reductions are not covered in the West Virginia WIP. Possible sediment reductions should have been illustrated in the WIP even though the allocation number was not provided by EPA until last minute. In this regard, for the purposes of calculating possible sediment reductions in the WIP, the input deck West Virginia submitted to the Bay Model included an "extractive land use " designation that refers to surface mining activities. West Virginia proposed to equate the nutrient and sediment loading to a forest loading. Surface mining activities produce significant sediment and nutrient inputs to rivers and streams during rain events and are not in any way equal to a forest system.

## **Regulated Stormwater**

Sediment and nutrient loadings from regulated stomwater activity is an important area that needs additional State and local support. There were no contingencies listed for these sections except the MS4. Similar to other permitted sections that are regulated by DEP, the WIP portrays the enforcement and compliance of permits are adequate and meet water quality standards, this is not true. There are as many as 631 construction stormwater permits that need to be monitored for BMP management to ensure turbid water does not reach our streams. This is not possible with only one DEP inspector. West Virginia needs to take sediment and nutrients from construction sites and MS4 sites more seriously by hiring more inspectors and working with local governments to provide support.

### **Non-Regulated Stormwater**

The WIP identifies contingencies for this section and the State needs to considered some if not all of these for inclusion in the two-year milestones.

### **Nutrient Exchange**

Since the Bay Model suggests that West Virginia has achieved its Phosphorus reductions with room to spare; a request to exchange the excess Phosphorus (P) for Nitrogen (N) reductions at a 5/1 ratio is being considered. This exchange should not take place. 193,000 lbs/yr of nitrogen would be taken off the required reductions set by the EPA model. If the model is set up to provide a fair share of the nutrient load reduction between the States, then there should not be any give on the required load reductions. The ecological effects of N and P are very different and N has a higher delivery ratio so more N will get to the Bay; which means there should not be any leniency on the required N reductions for West Virginia.

#### **Nutrient Trading**

## **Nutrient Hot Spots**

• Nutrient trading has the potential to create hotspots in local waters. Growth in the West Virginia Eastern Panhandle like many other urban areas connected to DC and Baltimore will continue to increase. These areas have predominantly wealthier residents paying

taxes to local governments to handle their sewage. It is in these areas that governments can afford to purchase nutrient credits, and it will continue to be these areas that will receive greater and greater growth requiring ever increasing need for offsets through trading. Trading is not sustainable. These local rivers and streams will also be the first choice for residents to visit and recreate, but not if the nutrients discharging into these rivers creates a smelly algae soup.

### State Standards and TMDL Violation

- The Clean Water Act delegates the authority to the States in developing a Pollution Permit system (NPDES) and to establish pollution loadings to all impaired streams (TMDL). Unfortunately the CWA and the EPA do not have a specific enough guidance for the States in how to develop these TMDLs. When it comes to nutrients, each State in the Bay Watershed has different processes for estimating waterbody impairment and therefore different TMDL development strategies. Maryland develops nutrient (nitrogen, phosphorous, sediment) TMDLs with an estimated cap for each of the sources. Pennsylvania has been developing nutrient TMDLs for phosphorous and sediment, but not nitrogen. Virginia has developed phosphorous and sediment TMDLs, but are just now starting TMDLs that include Nitrogen. West Virginia has Biological Impairment TMDLs that looks at nutrients as a function of the impairment, but does not have caps for Nitrogen or phosphorous and relies on the reduction of fecal coliform from point sources to reduce nutrients. Basically, all four States in the Potomac watershed are not on the same page. Each State is developing TMDLs differently and West Virginia is severely lagging behind. The standards by which all four States assess a shared watershed, should be the same, otherwise, the Potomac will suffer and continue to be plagued by nutrient pollution. West Virginia needs to develop nutrient TMDLs that set caps for nitrogen and phosphorus for both point source and non-point sources.
- Nutrient Trading can also violate local TMDLs. When a TMDL is developed, that waterbody has a specific load for that pollutant. It is necessary that all the sources that are within that waterbody decrease their load to the prescribed design of the best available technology. Unfortunately, since all the States, that share the responsibility of reducing nutrient loads to the Potomac, are not on the same page when it comes to developing Nutrient TMDLs, the Potomac's various river systems will never have an adequate nutrient accountability framework and reductions will never succeed. The Bay TMDL focuses on the Bay and does not provide protections for individual river systems like a local nutrient TMDLs would.

# Accountability: Regulated vs. Non-regulated

• The current push for nutrient trading has been inspired by the trading of air pollution credits. There are two distinct differences though 1) the air sheds are not permanently delineated and are very dynamic, unlike a watershed that is defined by its boundaries and has little variability. 2) The buyer and the seller within the air credit trading program are both regulated by the States or EPA, unlike the current push for nutrient trading credits between unregulated farms and a regulated NPDES permitted discharger. The accountability of the non-regulated farms to continue supplying the same level of credit

production cannot be guaranteed. Since waste water treatment structures are basically a permanent fixture and will require an endless supply of credits to remain nutrient neutral, the current unregulated agricultural system cannot be deployed. The credits generated will have no proof that the nutrient uptake is actual and not estimated. There is no accountability system that can guarantee credit production in the future.

Thank you for taking these considerations into account in developing the Final WIPs. Please contact me should you have any questions, require additional information, or if there is any other way that we may be of service.

Sincerely,

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